(3)

No. 09-805

In The

Supreme Court of the United States

David D.,

Petitioner,

v

New Jersey Division of Youth and Family Services
***ex rel* M.D. and K.D., minors,**

Respondents.

On Petition For Writ of Certiorari
To The Superior Court of New Jersey – Appellate Division

BRIEF OF RESPONDENTS

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STATEMENT OF CASE

T S , date of birth August 5, 1991, and the half-sister of Respondents M D and K D , told her therapist in January 2005 that she had been sexually assaulted by Petitioner, her then step-father, in 2001 The therapist contacted the New Jersey Division of Youth and Family Services (hereinafter "the Division"), which is New Jersey's child welfare agency, who then investigated along with local law enforcement The Division then filed a complaint to gain care and supervision of T S , M D and K D , the relief requested was granted Physical custody of the children remained with their mother, R C , who had separated from Petitioner approximately one month earlier

The incident which gave rise to the Division's involvement occurred on August 23, 2001 On that date, late in the evening, T S was sleeping in the basement of the family home, since the basement was cooler than her bedroom Petitioner was in the basement also, watching an adult-themed program on television While they were in the basement, Petitioner committed an act of sexual abuse by rubbing his penis on T S 's face

Moments later T S related the incident to R C , her mother R C confronted Petitioner, but Petitioner denied that the incident occurred R C decided to take no further action

Three years later Petitioner and R C divorced During this time, T S saw a therapist After the divorce was finalized, T S revealed the incident of abuse during a therapy session The therapist then contacted the Division The local prosecutor's office conducted an investigation but decided not to pursue criminal charges

Petitioner was permitted to have contact with his daughters, albeit supervised The bench trial under review commenced on March 11, 2008 [1] After five days of testimony, the trial court, with the trial judge sitting as the fact finder, ruled that Petitioner had committed the alleged act of sexual abuse upon T S , along with a 2003 incident in which Petitioner exposed himself to another minor, W K , who was T S 's friend The judge further found that M D and K D , Petitioner's daughters, were in need of protection from Petitioner This decision was affirmed by the Appellate Division of the Superior Court on June 1, 2009, discretionary review by the New Jersey Supreme Court was sought by Petitioner and denied on October 15, 2009

[1] A prior trial was reversed on grounds unrelated to the instant Petition

During the trial, the court took testimony from T S , age sixteen at the time of trial, and W K , age seventeen The trial court took their testimony outside of the presence of defendant The judge asked questions which had been posed by counsel and counsel were able to view the questioning Prior to trial, T S 's therapist had submitted a letter indicating T S 's preference for this procedure, as opposed to T S taking the witness stand with cross-examination The testimony was transcribed and preserved in the record Pursuant to *N J Stat Ann* 9 6-8 11, the Division was required to place Petitioner's name in the state's central child abuse registry of perpetrators

REASONS FOR DENYING THE WRIT

I Child Welfare Litigation is a Civil Proceeding, Nevertheless, States Which Have Addressed The Issue of Balancing a Parent's Interest in Confronting Child Witnesses with a Court's *Parens Patriae* Duty to Protect Children from Undue Trauma Have Resolved the Issue Consistent with this Court's Holding in *Maryland v Craig*, 497 *U S* 836, 110 *S Ct* 3157, 111 *L Ed 2d* 666 (1990)

The Petition at bar does not raise a cognizable federal question as no Constitutional right of Petitioner was violated during the child welfare litigation below Although a defendant parent in a child welfare action may, if found to have committed an act of abuse of neglect, be subject to a disposition which restricts parenting time in

order to protect the child,[2] such proceedings are civil in nature At times, children are called to testify and are permitted to do so in an alternative format designed to reduce the trauma of giving testimony regarding emotionally sensitive events Courts, however, in recognizing the significant interests at stake for defendant parents, have implemented procedures for receiving testimony from children that recognizes similar concerns as this Court did in *Craig* and ensures that defendant parents have a meaningful opportunity to rebut the child's testimony Petitioner's claim of a denial of the protections of the Due Process Clause, namely the Sixth Amendment's Right of Confrontation, is without merit

This Court has legitimized the priority states have given to protecting children from harm, even while testifying In general, family courts are called upon to make determinations of parental fitness based on the unique facts each case presents This Court noted that "[t]he judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review" *Palmore v Sidoti*, 466 *U S* 429, 431, 104 *S Ct* 1879, 1882, 80 *L Ed 2d* 421,

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[2] As Petitioner notes, because the trial court made a finding that Petitioner had committed an act of child abuse, the Division was required to keep Petitioner's name in the state's central child abuse registry *N J Stat Ann* 9 6-8 11

425 (1984), *In re Burrus*, 136 *U S* 586, 10 *S Ct* 850, 34 *L Ed* 500 (1890) The *Palmore* decision also recognized that the State "has a duty of the highest order to protect the interests of minor children, particularly those of tender years " *Id* , 466 *U S* at 433, 104 *S Ct* at 1882, 80 *L Ed 2d* at 425 This recognized the public interest in courts making custody determinations that are in the best interests of children and in implementing procedures to receive their testimony that safeguards a victimized child from emotional trauma that an adult in a similar situation would likely not experience

This Court has held that Constitutional protections provided to defendants in criminal matters are not applicable in a civil proceeding This is especially true when the divergence between civil and criminal procedures and defenses available to criminal defendants furthers public policy, such as shielding children from undue harm that would likely be caused by participation in a trial

Specifically in the context of a family court matter involving a government child welfare agency, this Court in *Baltimore City Department of Social Services v Bouknight*, 493 *U S* 549, 110 *S Ct* 900, 107 *L Ed 2d* 992 (1990) ruled that the *Fifth Amendment* privilege against self-incrimination may not be invoked by a defendant when a

government entity, in the context of non-criminal litigation, needs information possessed by the defendant in order to further the mission of the agency in protecting and providing services for children. In *Bouknight*, the defendant mother of a child under the jurisdiction of the local child welfare agency was imprisoned on a charge of civil contempt for refusing to reveal the whereabouts of the child to the agency. In holding that the defendant could not invoke the *Fifth Amendment's* protection against self-incrimination, the Court ruled that "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." *Id.* 493 *U.S.* at 557, 110 *S.Ct.* 906, 107 *L.Ed.2d* 1001 (citing *California v. Byers*, 402 *U.S.* 422, 91 *S.Ct.* 1535, 29 *L.Ed.2d* 9 (1971)).

Likewise, this Court found a distinction between civil child welfare litigation, involving a government agency charged with providing child welfare services, and a criminal action in holding that the *Due Process Clause* does not provide a guarantee of counsel to defendant parents, even in actions brought to forever extinguish parental rights. *Lassiter v. Department of Social Services of Durham County*, 452 *U.S.* 18, 101 *S.Ct.* 2153, 68 *L.Ed.2d* 640 (1981). The Court

found that due process is a concept without "fixed content", in determining whether the requirement of due process was satisfied in a particular case requires an inquiry into whether "fundamental fairness" was achieved *Id* 452 *U S* at 24-25, 101 *S Ct* at 2158, 68 *L Ed 2d* at 649 The Court noted the differences between criminal prosecutions in which a defendant would be in jeopardy of losing personal liberty with that faced by the defendant in *Lassiter*, namely an action in the family court to determine the best placement for the child A criminal action is strictly adversarial, child welfare litigation has the ultimate goal not of punishing a parent, but rather determining the best interests of the additional party uniquely present in these cases, the child As Chief Justice Burger wrote, "[t]he purpose of the termination proceeding at issue here was not 'punitive' (citations omitted) [o]n the contrary, its purpose was *protective* of the child's best interests" *Id* 452 *U S* at 34, 101 *S Ct* at 2163, 68 *L Ed 2d* at 654 (Burger, C J concurring)

This Court's distinction between civil actions involving child welfare and criminal prosecutions for child abuse is also exemplified in *Idaho v Wright*, 497 *U S* 805, 110 *S Ct* 3139, 111 *L Ed 2d* 638 (1990), in which the Court held that the criminal defendant's rights under the *Confrontation Clause* were violated In *Wright*, a defendant mother

was on trial for lewd conduct against her daughter in which the daughter was found by the trial judge to be incapable of testifying before the jury, yet a pediatrician was permitted to testify as to a statement the child had given to him detailing the defendant mother's conduct First, the Court criticized the pediatrician's interview style since the questions and answers were not recorded or otherwise preserved and leading questions were used *Id* , 497 *U S* at 82-13, 110 *S Ct* at 3146, 111 *L Ed 2d* at 650 The Court then recognized, however, that in some circumstances a hearsay statement may be admissible against a criminal defendant even though it violates the literal terms of the Sixth Amendment and that the "unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made " *Id* 497 *U S* at 822, 110 *S Ct* at 3150, 111 *L Ed 2d* at 657

This Court enunciated a three-element test for determining whether procedural due process has been satisfied *Mathews v Eldridge*, 424 *U S* 319, 96 *S Ct* 893, 47 *L Ed 2d* 18 (1976) The three elements used in deciding whether the requirement of due process was met include the private interest that will be affected by the government action, the risk of an erroneous decision being reached

by the procedures in question and the governmental interest in either maintaining the procedure or using a substitute procedure *Id* 424 *U S* at 335, 96 *S Ct* at 903, 47 *L Ed 2d* at 33 The Court emphasized that these criteria must be applied in a flexible manner *Id*

In a civil proceeding for determining whether a child has been abused, and, if so, to impose restraints for the protection of the child, a trial court allowing a child witness to testify in camera rather than on the witness stand satisfies the *Mathews* standard of due process, even if the testimony is taken outside of the presence of the defendant and the child is questioned by the judge, rather than counsel The first element under the *Mathews* test for determining if due process was afforded is, undoubtedly, favorable to the parent defendant in such actions Parents have an interest in raising their children free of government restrictions which is of Constitutional dimension, thus restrictions can only be permitted if found to be necessary for the safety of the children *Stanley v Illinois*, 405 *U S* 645, 92 *S Ct* 1208, 31 *L Ed 2d* 551 (1972)

The second and third *Mathews* elements support the assertion that a trial court allowing alternative procedures for receiving the testimony of children does not run afoul of the *Due Process* clause The

risk that such procedures will produce an erroneous finding that restricts a defendant parent's right to custody is minimal State procedures, in general, require that the court find that the child witness understands the difference between a truth and lie and the strict requirement to always tell the truth when answering questions Credibility of the child witness, like that of any other witness in a proceeding of this type, is determined by the fact finder The questions asked by the judge are largely generated by the attorneys, thus the defendant has an opportunity to address any areas which could expose inconsistencies in the account of the witness Given these key aspects of the manner in which testimony of the child witness is elicited, there is substantial compliance with the essence of the *Confrontation Clause*, ensuring that defendant is afforded due process

In relation to the third element, the court, through its inherent *parens patriae* responsibilities, has a compelling interest in maintaining the practice that victims of child abuse are permitted to testify in private in appropriate circumstances Giving testimony in this manner lessens the emotional trauma already felt by the victims in child abuse situations It is axiomatic that, in a proceeding to determine whether

an act of child abuse occurred, and, if so, what restraints are necessary, the court seeks not to cause additional harm. While the child witness is not totally immunized from the stresses of litigation, the court may properly seek to minimize the harm so long as the integrity of the truth-seeking aspect of the proceeding is preserved. Under the totality of the *Mathews* test, the practice of taking a child victim's testimony in private does not increase the likelihood of an erroneous finding and fulfills the court's responsibility to protect children in these proceedings from unnecessary harm.

The survey of cases from various states raised by Petitioner demonstrate the care state courts have taken to provide an acceptable level of due process to parents while maintaining an effective system for handling child welfare matters. In the Massachusetts matter cited by Petitioner, *Adoption of Mary*, 414 Mass. 705, 710, 610 *N.E.2d* 898, 902 (1993), the trial court was permitted to consider hearsay evidence, in the form of an investigator's report, because the defendant parent was given an ample opportunity to rebut the evidence contained in the report. In Maine, a child's prior recorded statement alleging abuse was permitted to be treated as testimony at trial because the trial court found that the three element

test of *Mathews* was met and, therefore, their admission did not offend the *Confrontation Clause*. *In re Charles Jason R.*, 572 A.2d 1080 (Me. 1990).

In proceedings with similar issues to the case at bar, the intermediate appellate court in New York and the Ohio Supreme Court held that the trial court did not commit an error in allowing the child victims of abuse and neglect to testify outside of the presence of defendants because counsel was able to question the children. *In re Heather S.*, 19 A.D.3d 606, 797 N.Y.S.2d 136 (N.Y.A.D. 2005); *Reynolds v. Ross Cty. Children's Services Agency*, 5 Ohio St.3d 27, 448 N.E.2d 816 (1993). An almost identical procedure to the one used by the trial court in the case at bar was found by the Rhode Island Supreme Court to satisfy due process challenges. *In re James A.*, 505 A.2d 1386, (R.I. 1986). In *James*, a trial judge took testimony from a child in chambers with only counsel present and no cross-examination by counsel; when the child cried during testimony, the courtroom was cleared and only the judge and stenographer remained. *Id.* In addressing the challenge based on the *Confrontation Clause*, the court found that "no constitutional right to confrontation or cross-examination attaches in noncriminal proceedings" and that the

procedure invoked struck a balance between not causing the child emotional harm and allowing the defendant parent adequate means to rebut the allegations *Id* at 1391

California's state courts have held that fundamental fairness under the equal protection clause is not violated when a hearsay statement of a child is admitted in a child welfare proceeding without the child being cross-examined if the statement has "indicia of reliability", there is corroborating evidence and the defendant has adequate notice in order to rebut that evidence *In re Apnl C* , 131 *Cal App 4th 599, 609, 31 Cal Rptr 3d 804, 809-10* (Cal App 2005) The Kansas Supreme Court noted that "[c]onfrontation and cross-examination are not rights universally applicable to civil proceedings" and that the trial court did not err in basing a decision that a child was abused based on a prior interview of the child by social workers, despite the child being "available" to testify *In the Interest of J D C* , *284 Kan 155, 168, 159 P 3d 974, 983 (2007)*

States which have addressed the issue of taking a minor's testimony outside of the defendant's presence, cited above, have done so while acknowledging and respecting the *Confrontation Clause* While the states have not adopted uniform procedures, each

has used the Sixth Amendment as a touchstone to begin their analysis Thus, the varied standards among the states that Petitioner suggests erode the protections of the *Sixth Amendment* do not exist

This Court, in *Craig*, has held that the Constitution does not guarantee a defendant the right to face-to-face confrontation of a child witness Recognizing that competing interests are at stake between a defendant and the courts in seeking to protect a child victim from emotional harm, so long as a defendant is given a meaningful opportunity to challenge the evidence presented by the child welfare agency, the essence of the *Confrontation Clause* is satisfied In the proceedings under review, Petitioner was afforded due process and had a meaningful opportunity to rebut the allegations against him

II The Manner in Which the Testimony of T S and W K Was Taken Did Not Violate Petitioner's Guarantee of Procedural Due Process

The trial court crafted a procedure for taking the testimony of T S and W K that was in accord with Petitioner's due process rights and compliant with this Court's decision in *Craig* The trial court took care to ensure that Petitioner had an opportunity to rebut the allegations for which he was on trial The trial court achieved a fair

balance between Petitioner ability to defend the allegations and the court's *parens patriae* responsibility to ensure that undue trauma did not come to the minors from their giving testimony

Petitioner asks this Court to assume that the outcome of the proceeding would have been more favorable to him had Petitioner himself, in addition to counsel, been present while the minors testified Petitioner does not set forth any lines of questioning which he would have raised on cross-examination Therefore, an inference can be drawn that the examination of the children by the trial judge, rather than counsel, is of no significance A fair reading of the trial judge's opinion indicates that the case turned on questions of credibility, particularly Petitioner's testimony which was found to be lacking in credibility

Petitioner states that the manner in which this testimony was taken at his trial is indicative of European courts, in which a judge can serve as the chief inquisitor The trial here is distinguishable in that the questions used by the trial judge in examining the child witnesses were based on areas of inquiry supplied by counsel The trial judge simply served as the conduit for receiving testimony in order to alleviate the

stress on the minors being questioned Thus, the examination of the witnesses was driven by counsel, not the trial judge

In conclusion, the Petitioner was given a substantial opportunity to challenge the testimony of T S and W K The case was decided on credibility determinations, Petitioner testified, but was found to lack credibility Under this Court's holding in *Craig* and the procedures adopted by various state courts discussed above, Petitioner was not deprived of due process at trial

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully Submitted

Date Feb 3, 2010

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